United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

76-7108

United States Court of Appeals
FOR THE SECOND CIRCUIT

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P/S

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974,

and

CHARLES LONG, PASQUALE DE ROSA, ALBERT ZAPPY, HARRY EDWARDS and ANTHONY DEL GAIS, each of them individually, etc.,

Appellees,

against

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, OPERATIVE PLASTERERS LOCAL 60, OPERATIVE PLASTERERS LOCAL 202 and OPERATIVE PLASTERERS LOCAL 852,

Appellants.

AMICUS MEMORANDUM OF INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES

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AMICUS MEMORANDUM OF INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES

The International Brotherhood of Painters and Allied Trades, AFL-CIO (hereinafter called "IBPAT") is a labor organization with over 200,000 members in the United States and Canada organized into various Local Unions and District Councils including the Appellee Drywall Tapers and Pointers of Greater New York, Local 1974.

Since November 29, 1961 the IBPAT has been and continues to be party to a National Memorandum of Understanding by and between itself, the Bricklayers International Union and the Operative Plasterers and Cement Masons' International Association (hereinafter called "Plasterers"), the latter party being the Appellant in the instant appeal. On the inside cover page of that Memo-

randum appears the following notation: "This Memorandum of Understanding is to supersede any and all agreements or understandings, either written or oral, which have been in use over the years, which pertain to the terms of work outlined in this Memorandum of Understanding." In relevant part, the body of the Agreement provides the following: "All pointing and taping of drywall, regardless of material used, is Painters' work, providing the drywall surfaces are not to receive plaster, acoustical or imitation acoustical finishes. . . ." Under that provision of the Memorandum of Understanding the work involved in the instant case belongs to employees represented by Local 1974 affiliated with the IBPAT and the Plasterers' attempt to take over all such jobs in the jurisdiction of Local 1974 was a blatant violation of the 1961 Memorandum. It was also a blatant violation of the no-raiding provision (Article XX) of the AFL-CIO Constitution, as found and concluded by Impartial Umpire David Cole on January 9, 1976.*

The 1961 Memorandum of Understanding, contrary to the assertion of Appellant, has been and remains a valid and viable instrument. In a series of decisions handed down from August 24, 1973 to November 11, 1973 the Impartial Jurisdictional Disputes Board for the Construction Industry specifically relied on the 1961 Memorandum in rendering awards involving the taping of drywall surfaces (Exhibits "B" through "K" to the Affidavit of James J. Shay; Item 11 in the Record on appeal). Representative language from such decisions is as follows: "The work in dispute is governed by agreement of November 29, 1961 and shall be assigned to Painters;" or "pointing and taping of drywall to receive paint is governed by the agreement of November 29, 1961 and shall be assigned to Painters." On December 11, 1973 the Joint Administra-

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* That decision is currently pending on appeal before the Executive Council of the AFL-CIO.

tive Committee of the Plan for Settlement of Jurisdictional Disputes in the Construction Industry found the question "repetitive", referred it to the International Presidents, and directed the Disputes Board to "defer action" on disputes of that nature. There have been no subsequent rulings by the Disputes Board as a result of that "defer action" directive. (Exhibits "O" and "P" to the Shay Affidavit; Item 11 in the Record.) Nevertheless, the three international unions, parties to the 1961 Memorandum, have continued to settle their disputes with reference to the terms of that Memorandum and it continues to be in full force and effect. (Exhibits "Q", "R" and "S" to the Shay Affidavit; Item 11 in the Record.) Indeed, in its reply Memorandum of Law to Plaintiffs-Appellees' Opposition to Stay, on page 2, the Plasterers conceded as much by stating: "The Defendants-Appellants have consistently based their requests for job decisions from the Impartial Jurisdictional Disputes Board on a 1947 Decision of Record contained in the 'Greenbook' . . . and only secondarily on the 1961 Memorandum of Understanding." Whether secondarily or primarily, the fact remains Defendants-Appellants concede that they themselves have relied on the 1961 Memorandum in requests for job decisions from the Disputes Board. That being the case, they can hardly be heard to complain that the 1961 Memorandum has been abrogated.

Moreover, the Plasterers' challenge to the scope of the injunction is also without merit. The injunction is quite properly directed to the Plasterers and their subordinate bodies as to any job site or job sites wheresoever located. It is after all a National Agreement that is being enforced, not an agreement pertinent only to New York or the jurisdictional area of Local 1974. It comports with common sense to enforce a National Agreement in its totality rather than limiting its enforcement to a particular job, jobs or area. Particularly is this so where, as in the instant case, the Plasterers have engaged in an aggravated violation

of the Agreement that is clear and beyond question, indicating clearly its contempt for an agreement to which it bound itself and has continued to bind itself since November 29, 1961. We shall not burden the Court with a lengthy recitation of the facts indicating the aggravated nature of the violation. Those facts have been set forth in Local 1974's Memorandum in Opposition to Defendants-Appellants Application for a Stay. They undoubtedly will be repeated in the brief submitted by Local 1974. Suffice it to say, for the purpose of this memorandum, that the Plasterers violated the agreement not merely by accepting jobs assigned to them by contractors, but by sending its members through a picket line established by Local 1974 in a legitimate primary dispute with the very same contractors. The members of the Plasterers physically took over jobs that only momements before had been performed by members of Local 1974. The breach of the Memorandum involved not one job but several; it violated the Memorandum not once but several times. There was a breach of the Memorandum in August and September of 1974; and another which began on March 20, 1975 and continued to expand into 1976 and up to the present time. In all, some 18 jobs have either been commenced with or turned over to members of the Plasterers for the performance of the very work that the 1961 Memorandum clearly assigns to the painters. Nevertheless, Plasterers contend the Order is too broad. It should be limited to the jurisdiction of Local 1974, they say, so that they could continue to breach it elsewhere throughout the country. In their Memorandum in Support of a Motion for a Stay, the Plasterers complained that the District Court's Order will cause "hundreds" of people to lose their jobs throughout the United States. This constitutes a bald and unashamed admission that the violation of the Memorandum is widespread—not limited to the city of New York or the jurisdiction of Local 1974 but throughout the United States and Canada. In these circumstances, the scope of the in-

junction and its issuance were clearly proper and appropriate.

Moreover, the Plasterers misconceive the nature of the *status quo* in urging that the District Court Order should be limited to the preservation of the *status quo*. To the Plasterers preserving the *status quo* is simply preventing the Plasterers "from encroaching any further upon the alleged work jurisdiction of the Plaintiffs-Appellees." But the *status quo*, it is plain, must not be deemed as the glorification of the present state of violation of the Memorandum of Understanding. Rather the object to be addressed is the preservation of the state of the relationship between the parties prior to the violation—the preservation of the parties' agreement to settle disputes in accordance with the 1961 Agreement.

For these, and other reasons briefed to this Court by Local 1974, the District Court Order should be affirmed.

Respectfully submitted,

David S. Barr
Attorney for Amicus International Brotherhood of Painters and Allied Trades

AFFIRMANCE OF SERVICE

The undersigned, an attorney duly admitted to practice before the United States Court of Appeals for the Second Circuit, and the attroney for the Appellees in the case of Drywall Tapers and Pointers of Greater New York, Local 1974, et al. v. Operative Plasterers and Cement Masons International Association, etc., et al., Docket No. 76-7108, now pending in that Court, hereby affirms that on April 15, 1976, he served three copies of the Amicus Memorandum of International Brotherhood of Painters and Allied Trades upon each of the firms of attorneys appearing on this appeal for appellants, to wit: O'DONOGHUE & O'DONOGHUE, ESQS. and COHEN WEISS & SIMON, ESQS., by mailing the same, properly addressed, enclosed and post-paid, to the said firms of attorneys at the addresses indicated by them for such service.

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